United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

76-7442
NOS. 76-7451

UNITED STATES COURT OF APPEALS CONSOLIDATED

FOR THE SECOND CIRCUIT

OSCAR ROBERTSON, et al.,

Plaintiffs-Appellees

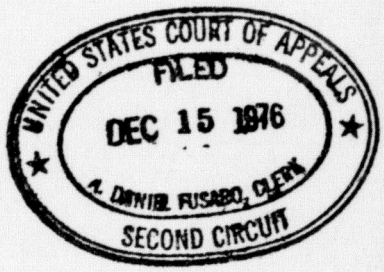
CHESTER WALKER, CLIFFORD RAY and WILTON N. CHAMBERLAIN

Appellants

vs.

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants-Appellees.



B P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT CHAMBERLAIN'S SUPPLEMENTAL BRIEF

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I.

PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. §§ 1291 and 1294(1) from the Final Consent Judgment of the District Court for

the Southern District of New York entered on August 4, 1976. (App.* 1686)**

The judgment approved a Stipulation and Settlement Agreement (hereinafter "Settlement") and made it part of the District Court's final judgment over the objections of appellants Wilton N. Chamberlain (hereinafter "Chamberlain"), Chester Walker and Clifford Ray. The judgment also provided for the retention of exclusive jurisdiction by the District Court for purposes of enforcing the terms of the Settlement. The Honorable Robert L. Carter presided over the proceedings before the District Court which are in issue herein.

II.

ISSUES PRESENTED FOR REVIEW

1. Does the District Court have jurisdiction over the person of Chamberlain, a non-party class member, which permits it to vest itself with the exclusive jurisdiction within which the res judicata effect of its judgment to certain events upon which Chamberlain instituted a separate action in California must be determined?

2. Were Chamberlain's constitutional rights under the due process clause of the Fifth Amendment violated by the District Court's certification of this class action under 23b(1)(A), rather than 23(b)(3), where only the latter contains an

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* References to "App." are to the Joint Appendix filed herewith. The documents included in the Joint Appendix are arranged chronologically and they are numbered consecutively. In some instances references to documents in the Joint Appendix may include the name of the document in addition to the page numbers. References to "R." are to the record for purposes of appeal.

** Robertson, et al. v. National Basketball Association, et al., 1976-2 Trade Cas. ¶61,029 (S.D.N.Y. 1976)

an opt-out provision, and where the requirements for 23b(1)(A) certification were clearly not met?

3. Did the events upon which Chamberlain instituted his separate action in California constitute a separate and distinct claim from those in issue before the District Court in the class action?

4. Was it an abuse of discretion for the District Court to conclude that the Settlement approved by its judgment was fair, reasonable, and adequate specifically with respect to the practices of the National Basketball Association and its members teams (hereinafter collectively referred to as "NBA") and the resulting injury to Chamberlain upon which Chamberlain instituted his separate action in California?

5. If the District Court did not conclude that the Settlement approved by its judgment was fair, reasonable and adequate specifically with respect to practices of the NBA and the resulting injury to Chamberlain, but only with respect to the class as a whole, was the individual interest of Chamberlain for which he instituted his separate action in California adequately represented by the representatives of the class and their counsel such that Chamberlain was a member of the plaintiff class for purposes of the application of the District Court's judgment to the claims he has asserted in California?

6. Was it an abuse of discretion for the District Court to approve on behalf of the class a Settlement containing provisions that are likely violations of §1 of the Sherman Act (15 U.S.C. §1)?

III.

STATEMENT OF THE CASE

This litigation was instituted by the player representatives of the National Basketball Players Association in April, 1970, on behalf of all present players in the NBA and all those who would become NBA players prior to final judgment. The Complaint sought an injunction against a merger of the NBA and the American Basketball Association (hereinafter "ABA") and the elimination of practices and procedures of the NBA, specifically the college draft and the reserve clause, allegedly designed to prevent competition among member teams for players' services. (Class Action Complaint, App. 912; Opinion dated July 30, 1976, App. 1667)

Chamberlain was a player in the NBA in April, 1970, and fell within the class as defined by the Complaint. In fact, on March 15, 1970, Chamberlain signed an authorization directed to the National Basketball Players Association with respect to filing a class action seeking injunctive relief and asserting a claim for damages. (App. 680(x)) Chamberlain did not, however, become a named plaintiff in the litigation.

Even before any attempt was made to present the question of class certification to the District Court, the named plaintiffs sought and were granted an injunction barring any merger or non-competitive agreements between the NBA and the ABA for players' services (App. 1 and 27; Opinion dated July 30, 1976, App. 1667-68)

In March, 1974, almost four (4) years after the Complaint was filed, the representative plaintiffs moved the District

Court for class certification. (App. 80) The District Court certified the class under Fed. R. Civ. P. 23(b)(1) on February 14, 1975.*

However, even prior to the motion for class certification, Chamberlain had departed the NBA for the rival ABA. In 1973, Chamberlain entered into a three (3) year contract to act as a player-coach for the San Diego Conquistadors commencing with the 1973/1974 playing season. (Chamberlain Depo., App. 1473, 1583-87; Opinion dated July 30, 1976, App. 1673) After Chamberlain entered into the contract with San Diego, the Los Angeles Lakers (California Sports, Incorporated), the NBA team with whom Chamberlain was last under contract, sought to enjoin him from playing for San Diego, claiming that he was under contract to them for one more year of service. This dispute was submitted to arbitration and the Lakers prevailed. Rather than play for the Lakers in the 1973/1974 season, Chamberlain chose not to play basketball. (Opinion dated July 30, 1976, App. 1673) **

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* Robertson, et al. v. National Basketball Association, et al., 389 F.Supp. 867 (S.D.N.Y. 1975); (App. 311)

** It was this failure to render playing services to the Lakers for the last year of the contract as provided in the "option" provisions which made any application of a boycott to Chamberlain based upon the requirement of payment of some form of compensation to the Lakers unique. As Mr. Rothenberg of the Los Angeles Lakers testified at his deposition in July, 1975, if Chamberlain desired to return to the NBA with a club other than the Los Angeles Lakers "it [would be] the case of first impression in the League." (App. 710) While Rick Barry also "sat out" his "option" year under an injunction, the question of compensation would not have arisen because when he returned to the NBA he joined his former team.

Finally, in mid-1975, five (5) years after the preliminary injunction against merger with the ABA had been obtained, serious discovery in anticipation of trial commenced. (R. generally)

During July, 1975, counsel for the class attempted to conduct certain discovery to determine whether any of the acts and practices of the NBA which were being challenged by the complaint on file would have any impact on Chamberlain's peculiar circumstances. When counsel questioned Mr. Rothenberg of the Los Angeles Lakers, Mr. Rothenberg took the position that Chamberlain's situation was different than the compensation rule in that Chamberlain had not played for the Los Angeles Lakers during his option year. Mr. Rothenberg further stated that such a situation had never occurred in the National Basketball Association before and, if such a situation were to occur, the NBA position was unclear. (App. 708-14)

On September 19 and 22, 1975, a "class action notice" was sent out to a total of 446 potential class members (App. 555) notifying them of the pendency of a class action complaint* challenging

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* After the motion for class certification in March, 1974, but before the District Court's decision in February, 1975, the plaintiffs filed an Amended and Supplemental Class Action Complaint. (App. 137) This Amended and Supplemental Complaint is dated April 22, 1974. There were, however, no amendments made to the substantive allegations of the original Complaint, the only changes occurring in the caption and paragraphs 4-8,10 and 12 for the purposes of reflecting the increase in the number of NBA teams , and the change in the status of certain original named plaintiffs which occurred over the four (4) years which had elapsed.

". . . the college draft, the 'reserve' or 'option' clause, the NBA policy or practice under which one member team in the NBA is compensated by another NBA team when a player signs a contract with that other NBA team after the player achieves 'free agent'** status, boycotts, blacklists, Uniform Player Contracts and other alleged agreements among the NBA and its member teams." (App. 547)

After Chamberlain left the NBA there was still interest on the part of certain NBA teams in securing his services as a player (Chamberlain Depo., App. 1479; Aff. of Michael Burke, App. 1320-22). And, in the fall of 1975, prior to the beginning of the 1975/1976 playing season, Chamberlain expressed some interest in returning to the NBA for the ensuing season with the New York Knickerbockers. (Aff. of Michael Burke, App. 1321)

Thus, after Mr. Rothenberg's deposition in July, the situation which he stated would be a case of "first impression" actually did occur.

What occurred was that although the New York Knickerbockers were prepared to offer Chamberlain a "very substantial" contract (App. 1321), their freedom to negotiate with Chamberlain was seriously impaired. As the record indicates, once the New York Knickerbockers were aware of Chamberlain's interest instead of contacting him to negotiate, they(1) contacted the NBA Commissioner's office to determine Chamberlain's status

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* "Free agent" status at least insofar as Mr. Rothenberg was concerned involved a situation such as Cazzie Russel where the player played out his "option" as opposed to "if he does not play the option year." (App. 712)

vis-a-vis the NBA, (2) were advised they had to negotiate with the Lakers for some form of payment,* (3) talked to the Lakers and had an offer of $25,000 just for the opportunity to speak to Chamberlain rejected, (4) were advised that the Lakers would discuss players and draft picks but would not entertain an offer of cash only as a payment, and (5) were finally given permission to talk to Chamberlain with the question of payment to the Lakers reserved. The record further indicates that once the Knickerbockers failed in their attempt to make contact with Chamberlain after finally being given the "right" to talk to him, that "right" no longer exists. (R., Burke Depo., 1-27-76, pp. 110-115). In short, when these events demonstrated that a boycott against Chamberlain was being implemented by the NBA, Chamberlain was injured and a cause of action for substantial damages accrued. And, it accrued after the District Court sent out notice to the class members.

Counsel for the class attempted to explore the circumstances surrounding these events in October, 1975, when the deposition of two Los Angeles Lakers' representatives were reconvened (R., Cooke Depo., 10-17-75; Rothenberg Depo., 10-18-75), but their efforts to do so were foreclosed on the basis that the NBA would not permit examination of the witnesses of any events which took place subsequent to their earlier testimony in July. (App. 705, 707) As counsel explained to the

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* Although the NBA Commissioner issued a statement indicating that Chamberlain was a "free agent" (App. 780) there was a condition attached (App. 724) about which no one has ever become totally informed because Mr. O'Brien's deposition was never taken in this proceeding and the deposition of Simon P. Gourdine from the Commissioner's office was taken in June and August before the events.

District Court at the hearing on January 23, 1976 (App. 1395) when the NBA would not permit examination of the witnesses concerning Mr. Chamberlain "we [were] told it's not in our case". (Transcript, 1-23-76, App. 1415)

In November, 1975, after the notice to the potential class members was sent out, counsel for the class sought leave of the District Court to file a Second Amended and Supplemental Class Action Complaint to allow, inter alia, "references to be made to the reserve clause compensation plan" although "the reserve clause compensation plan is surely already in the case,"* (App. 579) The Second Amended and Supplemental Class Action Complaint was filed on November 24, 1975.** ("Part of Ex. A, App. 965)

In December, 1975, Chamberlain alleging an additional boycott perpetrated solely against him, filed a separate individual action in the United States District Court for the Central District Court of California.*** (Order to Show Cause,

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* See discussion in the District Court's Opinion, dated February 14, 1975, Robertson, et al. v. National Basketball Association, et al., 389 F.Supp. 867,890-91 (S.D.N.Y. 1975) wherein "compensation plan" is discussed in terms of "free agent" status being acquired "after the player plays for the club for the one-year period, and assuming he does not sign a new contract." This should be distinguished from Chamberlain's situation which was labeled one of "first impression" five (5) months after the District Court's decision. (Rothenberg Depo., July, 1975, App. 710)

** The actual reference changes which were made with respect to the reserve clause compensation plan apparently appear in paragraphs 27, 36(d),(e),(h), and (i). A new paragraph 28 was added on another matter so the corresponding references in the first amended complaint for paragraph 36 would be paragraph 35(c),(d), and (g). Subparagraph 36 (i) has no corresponding reference in the first amended complaint.

*** Wilton N. Chamberlain v. National Basketball Association, et al., (75Civ-4258 AAH)

Exhibit A, App. 680). By doing so, Chamberlain unequivocally indicated his desire and intention to proceed on his own behalf on the cause of action which accrued at the time he was damaged by the NBA boycott which was implemented when he attempted to return to the NBA.

After Chamberlain filed his separate individual action in California, the NBA moved the District Court to enjoin Chamberlain from prosecuting that action and an Order to Show Cause and Temporary Restraining Order was entered. (App. 661) The District Court held a hearing on the Order to Show Cause on January 23, 1976 (App. 1395) and Chamberlain agreed that the restraining order could remain in effect until the District Court rendered an Opinion.

Chamberlain's separate action was enjoined by the District Court on March 31, 1976. (App. 1337)*

Apparently at the same time that Chamberlain was being enjoined from proceeding with his California action, the NBA and the named plaintiffs were negotiating the Settlement. The settlement discussions involved not only class counsel and counsel for NBA defendants, but members of an NBA negotiating committee, Lawrence Fleisher, general counsel for the NBA Players Association, a group representing named plaintiffs (Oscar Robertson, John Havlicek, and Jeffrey Mullins), and other members of the class (Paul Silas and James McMillian), all of whom participated in negotiating the terms that were finally agreed upon. (Opinion, App. 1670) The discussions did not

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* Robertson, et al. v. National Basketball Association, et al., F. Supp. , 1976-1 Trade Cas. ¶60,814 (1976)

involve Chamberlain or a representative.

On February 21, 1976, the Settlement was reached between the NBA and all named plaintiffs except appellant Walker. Notice of the Settlement was mailed to the class members on May 5, 1976. (App. 1161)

Chamberlain filed objections to the Settlement on June 7, 1976 (App. 1226). The District Court held a hearing on the Settlement's propriety on June 23, 1976 (App. 1610), rendered its opinion approving the Settlement over the objections of Chamberlain and the other appellants herein on July 30, 1976 (App. 1664), and entered its Final Consent Judgment on August 4, 1976. (App. 1686)

Chamberlain filed a Notice of Appeal from the entry of the Final Consent Judgement (App. 1393) and this appeal has followed.

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IV.

ARGUMENT

A. The Impropriety Of The District Court's Injunction Preventing Chamberlain From Prosecuting The California Action.

As the record now stands, Chamberlain has been enjoined from prosecuting his California action pending the disposition to this case. (App. 1337) Yet, by virtue of the inclusion of a covenant not to sue in ¶ 7(a) of the Settlement (App. 904) and the inclusion of a provision vesting continuing exclusive jurisdiction in the District Court to enforce the terms of the Settlement this action, will continue to pend indefinitely. In essence the District Court has vested itself with exclusive jurisdiction to determine the res judicata effect of its final judgment. It is respectfully submitted that this portion of the District Court's judgment is beyond its jurisdiction because it did not have in personam jurisdiction over Chamberlain. However, assuming the District Court did have in personam jurisdiction over Chamberlain, it is respectively submitted that this portion of the judgment constitutes an abuse of the District Court's discretion based upon the record herein.

1. The District Court's Judgment Exceeds Its Jurisdiction.

a. The Exercise of Injunctive Power to Implement the Principle of Res Judicata Requires In Personam Jurisdiction.

Although the usual method of implementing the res judicata effect of a judgment is an appropriate motion in the subsequent proceeding, it appears that an injunction may also be used to prevent relitigation under certain circumstance.

1B Moore, Federal Practice ¶ 0.408[2] (2d ed. 1948). However, prerequisite to the exercise of such injunctive power is in personam jurisidiction.

> "The enjoining forum must have in personam jurisdiction over the defendant and some means to enforce the injunction must be within its power, such as contempt proceedings against the defendant, sequestration of his property within the forum state, or closing the courts of the forum to enforcement of a judgment obtained in violation of the injunction."
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> 1B Moore, Federal Practice, supra, st 957.

Also see 7 Moore, Federal Practice ¶ 65.03[3] (2d ed. 1948), p. 61-31; ESP Fidelity Corporation v. Department of Housing and Urban Development, 512 F.2d 887, 890 (9th Cir. 1975); Saxe v. United States, 417 F.2d 1293, 1298 (2nd Cir. 1974); Heyman v. Kline, 444 F.2d 65 (2d Cir. 1971); Bethell v. Peace, 441 F.2d 495, 498-499 (5th Cir. 1971).

b. The District Court Did Not Have in Personam Jurisdiction Over Non-Named Class Members.

The fact that Chamberlain was a member of the class which the District Court certified did not confer upon it in personam jurisdiction over the person of Chamberlain. Calagez v. Calhoon, 309 F.2d 248 (5th Cir. 1962). In that case, plaintiff sued a Mr. Kellogg individually as Executive Vice President of a Union and as class representative for the Union in an action for declaratory and injunctive relief. Three days after Kellogg was served with process Kellogg died. The Plaintiff then

amended his complaint to substitute other class members as class representatives, and obtained substituted service under state law. The District Court dismissed the action on the ground of lack of jurisdiction and insufficiency of service of process.

On appeal, one theory Calagaz asserted was that in personam jurisdiction attached to all members of the class once service had been had upon their representative, so that he could freely substitute a successor in office or interest for the deceased class representative. The appellate court rejected the theory holding as follows:

> ". . .It is one thing to say that a judgment is binding upon all the members of the class; it is an entirely different thing to say that in personam jurisdiction attached to all members of the class once such jurisdiction has been acquired over one member and service of process had been made upon him. Individual members of the class are before the court only as far as they are class members; in personam jurisdiction does not automatically attach to each member once a suitable representative has been properly served.
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> * * *
>
> The plaintiff, therefore, can remain in court only if there is some basis for finding in personam jurisdiction over the other named defendants." 309 F.2d at 254.

In Fulton Lodge No. 2 of International Association of Machinists and Aerospace Workers, AFL-CIO v. Nix, 415 F.2d 212

(5th Cir. 1969), a union member sued his union for reinstatement. The lower court entered an order providing for injunctive relief against both the Union and the International, although the International had not been named as a party. It did so on the grounds, inter alia, that the action was in the nature of a class action. On appeal, the appellate court vacated the lower court's order enjoining the International. Although the court found that the International created the Lodge and gave directives to it in dealings with Nix, the court concluded that the existence of a substantive cause of action against the International based upon its joint participation with the Lodge did not vest the lower court with jurisdiction over it.

In fact, the very purpose of class actions is to render an adjudication of issues commonly held by a group without the necessity of a massive joinder of parties. As the court in Wainwright v. Kraftco, 54 F.R.D. 532 (N.D. Ga. 1972), stated, in refusing to grant sanctions for the failure of 146 non-named class members to respond to certain discovery requests which the court concluded were not properly sent to the class members because Fed. R.Civ. P. 33 and 34 speak only of discovery against parties and nothing in Rule 23 suggests that class members are parties:

> "Indeed, if class members were automatically deemed parties, all class actions would be converted into massive joinders. Such a result would emasculate Rule 23." 54 F.R.D. at 534.

In accord, see Fischer v. Wolfinberger, 55 F.R.D. 129 (W.D. Ky. 1971). (Non-named class members cannot be deemed parties for purposes of requiring them to respond to interrogatories).

The District Court for the Southern District of New York is in accord with the view that non-named class members cannot be deemed parties to the action over which the court has in personam jurisdiction. See Donson Stores, Inc. v. American Bakeries Company, 58 F.R.D. 458 (S.D.N.Y. 1973) wherein the court held that non-named class members in an antitrust case could not be deemed parties for the purpose of being subject to counterclaims under Fed. R. Civ. P. 13 since Rule 23 contemplates an adversary contest involving only the representatives of the class, with all other members of class being permitted passively to await the outcome of the principal suit. 58 F.R.D. at 489.

Thus, the District Court did not have in personam jurisdiction over Chamberlain and the injunctive effect of the judgment must be set aside.*

2. The District Court's Judgment Represents An Abuse Of Discretion To The Extent It Continues To Enjoin Chamberlain.

At this stage of this action a judgment provision which effectively permanently enjoins Chamberlain from prosecution of his California action is simply not justified by the record and to the extent the judgment does so it represents an abuse of discretion. No longer is such a provision a matter of a necessary incident by which to preserve the integrity of the District Court's jurisdiction in order to ensure an orderly determination on the matters brought before it, but rather it is a method by which to deprive Chamberlain of the right to select his own forum

* It is respectfully submitted that the District Court's original preliminary injunction was also in error for the same reasons.

to pursue the "substantial" damage claims which he believes are separate and distinct from those for which money damages were recovered herein.

In that respect, the circumstances of this case are not unlike the circumstances presented to the court in Texaco, Inc. v. Fiumara, 232 F.Supp. 757 (E.D. Pa. 1964) which caused the court to make the following observation:

> "Although a federal court has the requisite power to secure and preserve for parties the fruits of their prior judgment, I must note, however, that plaintiffs are seeking a highly unusual remedy in the instant case. In the event that the anticipated litigation occurs, plaintiffs prefer the severity of having the burden placed on Fiumara to show cause why a contempt citation should not issue against him for violating the injunction, rather than having to raise the defense of res judicata or collateral estoppel themselves. The rareness of the invocation of the type of injunctive remedy sought was demonstrated by plaintiffs' admission at oral argument that at that time they had found no instances where such powers have been sought or granted in this Circuit." 232 F.Supp. at 758-59.

Since the District Court opinion approving the entry of a consent judgment in this matter makes it clear that the court had not made a final determination as to whether Chamberlain may have claims which are not compromised by the Settlement, it is

difficult to imagine any compelling reason for the court to enter a judgment which restrains Chamberlain from any attempt to litigate whatever claims may still exist. Surely it cannot be considered onerous, oppressive, or harassing to the NBA to require it, under these circumstances, to present any claimed defense it has to such an action by way of affirmatively asserting res judicata. In fact, even if the District Court had made a final determination that all of Chamberlain's claims had been compromised, there is no evidence in this record which indicates any intention on Chamberlain's part to embark upon a course of continuous litigation against the NBA solely as a means of harassment.

As the court pointed out in Texaco, Inc. v. Fiumara, supra:

> "In addition to the customary restraint required in issuing injunctive relief, . . . the courts should exercise even greater restraint in issuing injunctions against the 'relitigation' of issues which were . . . in prior cases." 232 F.Supp. at 759.

It is respectfully submitted that the District Court abused its discretion in failing to exercise such restraint herein.

B. The District Court's Certification of A Class Under Fed. R. Civ. P. 23(b)(1) Was Error

Pursuant to Fed. R. App. P. 28(i), Chamberlain hereby incorporates and adopts by reference the discussion on this issue contained in the Joint Brief of Appellants' on Common Issues on

pages 9-15. Also see the discussion under part E below.

In addition to the foregoing, it is important to note that this action as originally authorized by Chamberlain was both to seek injunctive relief and to "assert a claim for damages". (App. 680(x)) The District Court recognized that under such circumstances it was inappropriate to grant class certification under Fed.R.Civ. P. 23(b)(2). See Robertson, et al. v. National Basketball Association, et al., 389 F. Supp.867, 900 (S.D.N.Y. 1975); (App. 311).

It is respectfully submitted that where there is an overlap between the applicability of subsections (b)(1) and (b)(2) of Fed.R.Civ. P.23 it is inappropriate to circumvent the logic behind rejecting certification of a non-opt-out class under (b)(2) where damage claims which are not merely incidental exist by simply electing to certify the class under (b)(1).

C. Chamberlain Has An Antitrust Claim For Damages In The California Action Which Is Separate And Distinct From Claims Subject To The District Court's Judgment Herein.

The District Court has in effect said that no final determination on this claim has been made. (App.1862-83) However, contrary to the District Court's initial determination, the record clearly establishes the unique and separate nature of the Chamberlain claim for the injury he suffered in October, 1975.

(1) At the time Chamberlain signed the authorization upon which the Appellees have placed so much significance, no NBA player had ever sat out the "option year" under his contract with one team and then attempted to negotiate with another

member team of the NBA. In fact, no one did so until Chamberlain. Chamberlain's attempt to do so was "the case of first impression in the League". (App. 710) Appellant Walker's was the second.

(2) The "reserve clause compensation plan" applied to a "free agent" a status which Chamberlain did not have. (App. 712) Moreover there is no evidence in the record which indicates that Chamberlain or any other player had actually been damaged by such a restraint at the time this action was originally instituted.*

(3) The restraint implemented against Chamberlain in October, 1975 (the so called "indemnification" procedure whereby a "team claims a deprivation of some expectation or right and lack of full performance by the player and therefore a greater claim, [against the team with which that player signs] if you will, than in the case where the player has performed his option year" (App. 717)) caused Chamberlain "substantial" damages.**

(4) The restraint was not fully implemented and Chamberlain was not injured until after the class notice had been sent out and received.

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* In fact the record is somewhat barren as to actual instances in which the restraint of the alleged "reserve clause compensation plan" might have been implemented.

** See following page.

Chamberlain's claim is unequivocally separate and distinct from those in issue herein. Chamberlain's claim in the California action seeks damages for a violation of the anti-trust laws.

The law is clear that an antitrust cause of action accrues at the time injury is sustained as a result of illegal activity, McClellan v. Montana-Dakota Utilities Co., 204 F.2d 166, 169 (8th Cir. 1953); Momand v. Universal Film Exchanges, 172 F.2d 37,49 (1st Cir. 1948); Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F.2d 569,576-577 (9th Cir. 1948); Charles Rubenstein, Inc. v. Columbia Pictures Corporation, 154 F. Supp. 216,219 (D. Minn. 1957); and that an injury sustained as a result of different illegal acts and at a later date gives rise to a new and separate cause of action. Lawlor v. National

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Footnote from preceding page:

** The record on appeal discloses that the potential damage claim of Chamberlain for the events upon which Chamberlain based the action filed in California was indeed "substantial". The last contract entered into by Chamberlain with the Los Angeles Lakers of the NBA was a two-year contract calling for compensation of Four Hundred Thirty Thousand Dollars ($430,000) in salary in the 1971/1972 playing season, and Four Hundred Fifty Thousand Dollars ($450,000) in salary in the 1972/1973 playing season, plus forgiveness of a Sixty-Seven Thousand Dollar ($67,000) loan. (Opinion dated July 30, 1976, App. 1673) The contract entered into by Chamberlain with the San Diego Conquistadors of the ABA called for compensation at the rate of Two Hundred Thousand Dollars ($200,000) for each of three playing seasons (1973/1974, 1974/1975 and 1975/1976) plus additional financial consideration in the form of "money up front" (Chamberlain Depo., App. 1585). The foregoing clearly establishes parameters for what Mr. Burke means when he says "substantial" and, in fact, when the management of the New York team had discussed internally how much money they could offer Chamberlain they "discussed it in terms of the contract he had with the Lakers", as they knew it - a $450,000 contract. (R. Burke Depo., 1-27 and 28-76, p. 123)

Screen Service Corporation, 349 U.S. 322,327-328, 1955 Trade Cas. ¶68,016 (1955); Exhibitors Post Exchange, Inc. v. National Screen Service Corporation, 1970 Trade Cas. ¶73,053 (5th Cir. 1970); International Railways of Central America v. United Fruit Company, 1967 Trade Cas. ¶71,987 (2d Cir. 1967).

Despite the foregoing, since Chamberlain filed his individual action in California, Appellees have steadfastly maintained that the restraint put into effect by the NBA, its Commissioner and its member teams against Chamberlain with respect to his attempts to contract with the New York Knickerbockers to play basketball commencing with the 1974/1975 season was always part of the case. (Memo. of NBA in Support of Prelim. Inj., App. 736-739; Affidavit in Further Support of Settlement, 68, App. 1276)

> "The distinction which Chamberlain's attorneys would attempt to draw between 'playing out' the option year and 'sitting out' the option year is highly artificial and without significance." (App. 738)
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> * * *
>
> "Chamberlain contends that his antitrust claim is not covered by the Robertson case, in that it was not the reserve compensation rule which was applied to him but rather a new and different 'indemnification rule'. I am not aware of any 'indemnification rule' ever applicable in the NBA with respect to Chamberlain or otherwise. When Mr. Chamberlain was declared to be a free agent in October 1975 by NBA Commissioner, he was rendered subject to the same compensation rule that is applicable to all free agents who completed

the option year in their contracts. Thus nothing "different" happened to Chamberlain." (App. 1276)*

Yet, the very Settlement which the District Court's final judgment incorporates and puts into force and effect contains this precise distinction. Under the terms of the Settlement it is only if a player has not "sat out" that he becomes a "free agent".

> "'Veteran Free Agent' means a Veteran who completes his Player Contract by rendering the playing services called for thereunder." (Settlement, Definitions (o), App. 859)

Thus, perhaps the most compelling evidence that the practices which Chamberlain challenged in his California action (requiring payment from one NBA team to another for the "lost" year of service from a player who sits out his option) are separate and distinct from those raised by the class in this action is that they are practices for which the Settlement apparently provides no relief and which will continue unabated.

This will be the case, unless, of course, the NBA is precluded from exercising this restraint against Chamberlain and

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* This assertion by counsel for the class is somewhat curious since at the time the plaintiffs sought leave to file the second amended complaint to add reference to the "reserve clause compensation plan" counsel specifically explain the application of the restraint as the practice of imposing upon so-called "free agent" players, who have completed the playing term plus all options for one team, the requirement that any new team which executes a contract with the "free agent" must compensate the player's former team with cash and/or other players and/or draft choices." (Aff. of Peter Gruenberger ¶ 8, App. 564).

Walker by the provisions of Paragraph 2C(2) of the Settlement which provides that except as described in paragraph 2C(1) "their shall be no other compensation obligation, rule, practice, policy, regulation or agreement created or applied in the NBA". (Settlement, App. 874). This however, is a circumstance which is not contemplated by the NBA.* Therefore in light of the provisions against a "compensation" rule for anyone but Veteran Free Agents it must be assumed that a rule applied to Chamberlain who is not a Veteran Free Agent is something other than a "compensation" rule.

D. The District Court Could Not Reasonably Conclude That The Settlement Was Fair, Reasonable And Adequate As To Chamberlain

The District Court could not have reasonably concluded that the Settlement was fair, reasonable and adequate as to Chamberlain upon the record before it. First, since the District Court has indicated that it had not finally determined whether Chamberlain will have any separate claim based upon the events occuring in the fall of 1975 which will survive its judgment, it had not even determined what the claims were of Chamberlain in this action which were being compromised. Second, if the District Court assumed that Chamberlain had no claim which would survive the compromise, the very magnitude of that claim for money damages establishes the unfairness and inadequacy of the compromised damage recovery that is provided for in the Settlement.

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* At the Pre-argument Conference held herein on October 13, 1976, the NBA's counsel unequivocally indicated that some compensation policy still existed with respect to Chamberlain.

1. The Record As To Chamberlain's Claim Is Incomplete.

The present state of the record reveals that the District Court did not know whether the damage claims asserted in Chamberlain's California action would be compromised by the Settlement it approved.

> "Chamberlain does not object to the settlement as long as his rights to continue his litigation remain unaffected by the class covenant not to sue. Determination of that question is dependent upon the nature of the Chamberlain lawsuit and the extent to which it raises issues distinct and apart from those presented in this litigation. [citation omitted] Resolution of that question may require a full hearing and consideration." (Opinion dated July 30, 1976, App. 1682-83; Transcript, 6-23-76, App. 1652)

Thus, in approving the Settlement, the District Court could not have made a determination as to fairness specifically with respect to Chamberlain. It simply did not have the facts to do so.

The District Court at one time thought it would have such facts, but the discovery on these claims never occurred. At the preliminary injunction hearing on January 23, 1976, in response to comments made by counsel for the class, the District Court made the following observation about potential discovery with respect to Chamberlain's situation:

> "You don't need them, do you? Mr. O'Brien was

was the one who handed down the ruling. He knows more about it, at least it seems from the newspapers. He ought to know more about it than they did and can explain it to you as well as they did." (Transcript, 1-23-76, App. 1416)

Mr. O'Brien's deposition was never taken.*

2. If The Claims Asserted By Chamberlain In His California Action Are Compromised, The Settlement Is Unfair To Chamberlain.

The Settlement provides for a damage fund of 4.3 million dollars to be allocated among 479 class members according to a formula which, as counsel for the class are so quick to point out, takes into account "differing competitive circumstances" (Aff. in Further Support of Settlement, App. 1276; R.,Memo in Further Support of Settlement, p. 51) Chamberlain's allocated share is $26,887.

Surely such a figure does not reflect the differing competitive circumstances existing with respect to Chamberlain, and Chamberlain alone, in October, 1975 - the implementation of a blantant and flagrant group boycott to Chamberlain who was a case of "first impression" which may have caused actual damage to Chamberlain in amount which conservatively can be placed at

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* Mr. Simon P. Gourdine was identified by Mr. Burke as also being involved (R., Burke Depo., 1-27-76, p. 111) on behalf of Mr. O'Brien, the NBA Commissioner, but his deposition was taken in June and August prior to the events.

Four Hundred Fifty Thousand Dollars ($450,000).*

Nor, as is demonstrated above, can it be said that Chamberlain benefited from the discontinuance of certain restraints. The Settlement does not appear to provide the player who sat out his option any relief from the type of restraint imposed on Chamberlain. Chamberlain cannot now play the year he sat out so that he will become in the terms of the Settlement a "Veteran Free Agent". In fact, the record herein demonstrates that when he offered his services to report to the Los Angeles Lakers for the 1975/1976 playing season, it was suggested to him that he not report to "avoid any possibility of embarrassment". (App. 726)**

E. The District Court's Approval Of The Settlement As Fair, Reasonable And Adequate For The Class Cannot Bind Chamberlain Without Depriving Him Of Due Process

In 1975 when Chamberlain was injured and brought his

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* It did not. In fact, although the damages claimed by Chamberlain for conduct in October, 1975, far exceed any damages arising from the restraints in issue in the action which might have withstood a claim of "speculation", the formula was weighted in favor of the early years before the filing of this action since it was assumed that many restraints were discontinued.

** It cannot be seriously contended as counsel for the class seems to suggest that Chamberlain had been benefited by an alleged change from the "once perpetual reserve clause" to a "one-year option." (Aff. in Further Support of Settlement, ¶65, App. 1275) Chamberlain secured the same ruling during the course of his contract dispute with Los Angeles, a dispute in which he was represented by his present counsel. Moreover, both Jim Barnett and Rick Barry may have beaten Chamberlain to the punch. See, Central New York Basketball, Inc. v. Barnett, 181 N.E. 2d 506 (Ohio Com Pl., 1961) and Lemat Corporation v. Barry, 80 Cal. Rptr. 240 (1969).

California action, he was not a player in the NBA. When the NBA implemented its restraint against Chamberlain when he attempted to return to the NBA in 1975, Chamberlain's circumstances were unique - "first impression" - because he did not play his option year. In 1975, Chamberlain's only concern was being able to freely negotiate for his return to the NBA with any team. He was not able to do so and it was on that basis he brought his action.

The merits of this claim must be litigated or compromised by Chamberlain and Chamberlain alone. They should not and cannot be compromised by counsel for a class of plaintiffs who are currently playing or are certain to be playing as a result of being drafted. The interest with which these plaintiffs are primarily concerned is the establishment of non-restrictive conditions under which they will be contracting to play. Chamberlain shared that interest in 1970 when he signed an authorization for an action to be filed because he was a player and to the extent that the Settlement allocates a damage recovery to him for damages incurred during the period he was a player (both prior to and after the filing of this action) he can be said to be a class member who can be bound by the class judgment.

But, Chamberlain was not a player in the NBA in October, 1975, when the NBA entered into a boycott against him for which he claimed damages in his California action. There was not and could not be a named class plaintiff in this action which could adequately represent Chamberlain's interest in this respect. Chamberlain was a case of "first impression".

Chamberlain had paid his dues - he sat out the year of the "option" period and then found he could not negotiate under conditions which were freely competitive. The class plaintiffs' interest in this lawsuit and in any settlement of it was to secure some assurance from the NBA that they would not have to pay the same price in the future.* How could they represent the interests of Chamberlain who had already paid the price.

The appellate courts in both the Seventh and Fifth Circuits have recognized that there may be instances during the course of a class action proceeding where, due to certain events, a class representative's interests are such that they no longer adequately represent the interest of a member of the class. Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO v. American Airlines, Inc., 490 F. 2d 636 (7th Cir. 1973); Gonzales v. Cassidy, 474 F. 2d 67 (5th Cir. 1973). Chamberlain's appeal herein presents this same issue.

The Seventh Circuit's decision in the Air Line Stewards case even came in the same context as the present appeal. In that case a class action on behalf of both stewardesses who had been terminated for pregnancy and those who might in the future be terminated for that cause was certified by the lower court under Fed. R. Civ. P. 23(b)(2). A class settlement was made and approved by the lower court (see earlier case history appearing at 455 F.2d 101 (7th Cir. 1972)), and some of the members of the

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* That this is true is demonstrated by counsel for the class by the overwhelming importance he attaches to his claimed victory with respect to the perpetuality of the reserve clause. (App. 1275; also, see Footnote **, supra, at p. 27)

purported class appealed the approval of the settlement claiming that as terminated stewardesses they were inadequately represented by the class plaintiffs. As a result of the objections, the court remanded the case with directions to the lower court to create subclasses under Rule 23(c)(4) if desirable for adequate representation and to conduct the action under the opt-out provisions of Rule 23(b)(3). While the court concluded that the action should have been maintained as a Rule 23(b)(3) from the outset, it made the following comment concerning the change in the adequacy of representation which occurred during the course of the litigation.

> "When the airlines ended their discharge policy, the actions became virtually moot as far as the currently employed stewardesses were concerned, and purely prospective relief against the practice became of little moment. The (b)(3) character of the actions, while always present as to the discharged stewardesses, became even more obvious." 490 F.2d at 643

From the record it would appear that there can be no question that the class plaintiffs could no longer represent the interest of Chamberlain after he was no longer a member of the NBA.*

The court in the Gonzales case was considering the question of adequacy of representation as a result of a class proceeding, not on a direct appeal from an order approving a settlement, but in a subsequent proceeding where a prior class

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* Counsel for the class implicitly recognized from the outset the difficulty of attempting to reconcile such conflicts between present and future players, on the one hand, and former players, on the other, when the initial complaint was filed defining a class consisting only of present and future players.

judgment was being asserted as res judicata. The Court's analysis on the question of adequacy is very instructive.

> "To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class?" 474 F. at 72. (emphasis added)

In order to determine the answer to the second question posed above, the court in Gonzales concluded the primary criterion is "whether the representatives . . . vigorously and tenaciously protected the interests of the class" as viewed throughout the "entire litigation." 474 F.2d at 75. Measured against this criterion, the court concluded that the representative in the prior class litigation had not done so because he had failed to pursue an appeal of an order which denied certain relief secured by him but denied other members of the class.

After Chamberlain left the NBA, the conflict between his interests and the interests of the class became readily apparent and Chamberlain could no longer be adequately represented by the class. Under these circumstances, if the Settlement is to conclude this litigation then Chamberlain must be permitted to avoid the res judicata effect with respect to the claims asserted in the California action. Chamberlain's interests in these claims cannot be cavalierly dismissed by a summary conclusion of class counsel that his injures were self inflicted.

> "Neither one points out that the damages claimed by them ($185,000 for Walker and an unspecified amount for Chamberlain) might have been avoided by each of them in 1975. It is not the Settlement Agreement which caused them the damages they claim." (Aff. in Further Support of Settlement, ¶73, App. 1280)

Chamberlain is certainly entitled to have this conclusion tested in a court of law rather than compromised in settlement discussions conducted by persons who do not share his interests. The antagonism of class counsel to Chamberlain and his claims is clear beyond cavil from the above statement alone, and it is respectfully suggested that this Court need look no further in the record for conclusive proof that prior to settlement of this case, Chamberlain was no longer adequately represented by the class. This being the case due process requires that Chamberlain be excepted from the operation of the provisions of the Settlement insofar as they purport to compromise his damage claim of 1975 and that he be permitted to pursue those claims independently.

F. It Is An Abuse of Discretion For The District Court To Approve A Settlement If Its Effect Violates The Law

Pursuant to Fed. R. App. 28 (i), Chamberlain hereby incorporates and adopts by reference the discussion on this issue contained in the Joint Brief of Appellants' on Common Issues.

V.

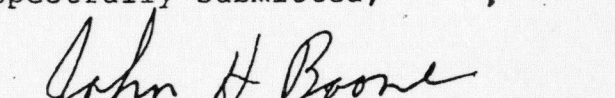
CONCLUSION

For the foregoing reasons, Chamberlain requests this Court (1) to vacate the preliminary injunction issued by the District Court; (2) to vacate the judgment entered by the District Court to the extent it prevents him from asserting the

damage claim arising out of the NBA's conduct toward him in 1975 in any forum he choses; and (3) to either (a) adjudge and decree that the Settlement approved by the District Court shall not constitute res judicata or a collateral estoppel of his damage claim as asserted in the California action, or (b) vacate the Final Consent Judgment and its approval of the Settlement, remanding the action to the District Court for certification under Rule 23(b)(3) with its opt-out provision and further proceedings forthwith unless settlement as to some or all issues is agreed upon by the appropriate parties and approved, on notice by the Court.

Dated: December 15, 1976

Respectfully submitted,

By 
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CERTIFICATE OF SERVICE BY MAIL

I, David M. Zeff , declare under penalty of perjury:

That I am a citizen of the United States, over the age of 18 years and not a party to or interested in the within entitled cause. My business address is Russ Building, Suite 420, 235 Montgomery Street, San Francisco, California 94104.

That I served by mail the following document(s):

Two true copies of APPELLANT CHAMBERLAIN'S SUPPLEMENTAL BRIEF.

by enclosing two copies of the said document(s) in a separate postage paid, sealed envelope(s) addressed as follows and today placing the said envelope(s) in a regularly maintained United States Postal Service mail depository in the City and County of San Francisco, California.

To the persons listed on Exhibit A, attached.

DATED: 12-14-76
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